Michael K. Jeanes, Clerk of Court
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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2012-000338-001 DT 10/04/2012

CLERK OF THE COURT
COMMISSIONER MYRA HARRIS K. Waldner
Deputy

BARBARA JOVEL

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9020 S 230TH AVE
BUCKEYE AZ 85326

v.

CHESTER GAREY (001)

MICHAEL E CORDREY

BUCKEYE MAGISTRATE COURT
REMAND DESK-LCA-CCC

RECORD APPEAL RULING / REMAND

Lower Court Case No. CV2012–0013.

Defendant-Appellant Chester Garey (Defendant) appeals the Buckeye Magistrate Court's determination granting Plaintiff an Order of Protection. Defendant contends the trial court erred. For the reasons stated below, the court reverses in part and affirms in part the trial court's judgment.

I. FACTUAL BACKGROUND.

On January 18, 2012, Plaintiff sought an Order of Protection after alleging Defendant was harassing her by (1) sending numerous text messages and (2) taking her truck from her place of employment for a 2-hour period without her authorization. Defendant requested a hearing on the Order of Protection on January 23, 2012, and the trial court held a contested hearing on January 30, 2012.

At the hearing[1] the trial court asked the Plaintiff if she had a witness or if the person with her was there for support.[2] Plaintiff replied the person was present as support. The trial court then instructed both parties that the court would be asking some broad questions and the parties were only to talk to the court. The trial court said:

> So where we are is somewhat back to square one. What I'm going to do is I'm going to ask each of a couple of very broad questions [sic]. When I ask the question, I don't want either one of you to interrupt each other, you don't talk to each other, you talk directly to me. That's all. Is that understood? Okay.[3]

[1] Transcript of Proceedings, Order of Protection Hearing, January 30, 2012.
[2] *Id*. at p. 4, ll. 15–18.
[3] *Id*. at p. 5, ll. 5–10.

The trial court asked each party if that person filed for dissolution and Defendant replied affirmatively.[4] The trial court commented the matter "really belongs up in Superior Court" but continued with the hearing.[5]

Plaintiff's friend—Teresa Coleman—then asked the trial court if she could participate in the hearing and the trial court took testimony from her.[6] Defendant was not offered the opportunity to cross-examine either Plaintiff or this witness. The trial court then upheld the order of protection and found that 178 texts in four days "is more than excessive."[7] The trial court announced it would transfer the case to the Superior Court[8] and informed Defendant the *Brady* disqualification would apply.[9]

Defendant filed a timely appeal. Plaintiff failed to file a responsive memorandum. This Court has jurisdiction pursuant to ARIZONA CONSTITUTION Art. 6, § 16, and A.R.S. § 12–124(A).

II. ISSUES:

A. Did The Trial Court Deny Defendant Due Process By Failing To (Provide For Cross-Examination.

Defendant is guaranteed due process by both the U.S. Constitution, *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 313, 70 S. Ct. 652 (1950), and the Constitution of the State of Arizona, Article 2, Section 4. When a litigant is so restricted in presenting his or her position that the litigant lacks a meaningful opportunity to be heard, fundamental error occurs. Fundamental error goes to the case's very foundation that prevents a party from receiving a fair trial. *State v. Henderson*, 210 Ariz. 561, 567, 115 P.3d 601, 607 ¶ 19 (2005). Due process is a flexible concept. In *Matthews v. Eldridge*, 424 U.S. 319, 334, 96 S. Ct. 893 (1976) the U.S. Supreme Court ruled:

> [D]ue process is flexible and calls for such procedural protections as the particular situation demands.

According to ARPOP, Rule 8(D), Defendant had the right to cross-examine the adverse party and the witness who testified.[10] *State v. Correll*, 148 Ariz. 468, 473, 715 P.2d 721, 726 (1986). Although Rule 8(D), ARPOP, mandates the right to cross-examination in a contested hearing, the trial court did not afford either party this important constitutional right.

In *Marco v. Superior Court*, 17 Ariz. App. 210, 496 P.2d 210 (Ct. App. 1972), the Arizona Court of Appeals commented on the constitutional mandates required in a protective order

[4] *Id.* at p. 6, ll. 19–25; p. 7, ll. 1–12.
[5] *Id*. at p. 7, ll. 19–25.
[6] *Id*. at p. 13, ll. 1–25.; p. 14, ll. 1–9.
[7] *Id*. at p. 15, l. 9.
[8] *Id*. at p. 16, ll. 17–19.
[9] *Id*. at p. 18, ll. 2–15.
[10] Neither side was given the opportunity to present other witnesses. Therefore, the trial court's actions resulted in a total lack of cross-examination.

proceeding. In *Marco, id*., the trial court accepted counsels' averments prior to sustaining cross petitions for protective orders. The Court of Appeals vacated the trial court's action, stating:

> The due process clause requires that every man shall have the protection of his day in court, and the benefit of the general law, a law which hears before it condemns, which proceeds not arbitrarily or capriciously, but upon inquiry and renders judgment only after trial. It means that no citizen shall be deprived of his life, or his liberty, or his property, without reasonable notice and reasonable opportunity to be heard according to the regular and established rules of procedure.

Marco, id, 17 Ariz. App. at 212, 496 P.2d at 638 [citations omitted]. In *State ex rel Romley v. Superior Court, In and For County of Maricopa*, 172 Ariz. 232, 236, 836 P.2d 445, 449 (Ct. App. 1992) the Arizona Court of Appeals held:

> The defendant also has a concomitant right to effective cross-examination of a witness at trial.

Failing to provide the opportunity to cross-examine the witnesses against a litigant is fundamental error. Although fundamental error is rare in civil cases, it can occur. *Monica C. v. Arizona D.E.S.*, 211 Ariz. 89, 118 P.3d 37 ¶¶ 23–25 (Ct. App. 2005).

B. Did The Trial Court Err By Notifying The Sheriff Of A Positive Brady Indicator.

Under the Violent Crime Control and Law Enforcement Act of 1994, 18 U.S.C. § 922, courts must notify the Sheriff if a protective order—after notice and a hearing—meets the requisite criteria to prevent the Defendant from owning, possessing, or purchasing firearms or ammunition—*Brady* disqualification. According to this law, a defendant is disqualified from possessing or purchasing firearms or ammunition if (1) a protective order was affirmed after a hearing where the Defendant received notice and had an opportunity to participate; (2) the Defendant is subject to a protective order that restrains him or her from harassing, stalking, or threatening an intimate partner; or (3) the Defendant is subject to a protective order that restrains him or her from engaging in conduct that would place an intimate partner is reasonable fear of bodily injury.

Here, the underlying Order of Protection did not mention the use, attempted use, or threatened use of physical force. Similarly, Plaintiff's Petition did not mention the use, attempted use, or threatened use of physical force. Instead, her Petition alleged (1) Defendant texted her numerous times and (2) took the truck she drove to work from the parking lot where she placed it but returned the truck two hours later. Plaintiff did not testify about any threats or actual physical harm at the January 30, 2012, contested hearing. The trial court made no finding about any (1) threats of physical force or (2) actual physical force. 18 U.S.C. 922 (g) (8) states:

. . . . .

> It shall be unlawful for any person--
>
> **(8)** who is subject to a court order that--
>
> **(A)** was issued after a hearing of which such person received actual notice, and at which such person had an opportunity to participate;
>
> **(B)** restrains such person from harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child; and
>
> **(C)(i)** includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child; or
>
> **(ii)** by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury; or
>
> **(9)** who has been convicted in any court of a misdemeanor crime of domestic violence, to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

Here the trial court found the *Brady* disqualification can and did apply as Defendant met the two necessary requirements: (1) an intimate relationship and (2) the protective order which precluded Defendant from engaging in harassing conduct remained in effect after notice and the opportunity to participate in a hearing. Because the Defendant met the requirements for *Brady* disqualification, the trial court notified the Sheriff of a positive *Brady* indicator. It did not err is so doing.

C. Did The Trial Court Err By Holding A Contested Hearing After Being Apprised Of A Pending Dissolution Action At Superior Court.

Although limited jurisdiction courts are not to issue protective orders if the petition or the plaintiff's statement reveals there is a pending action for dissolution, at the time the original Order of Protection was issued Plaintiff did not indicate there was a pending action. Similarly, at the time Defendant requested his hearing,[11] he also failed to indicate there was a pending dissolution action. The trial court was only apprised of the pendency of the dissolution

[11] Although Defendant—in his appellate memorandum at p. 2, ll. 5–7—indicated he was not asking for a hearing, the document he actually signed was a "Request: Hearing" which requested that a hearing be set on an Order of Protection issued on 1/18/12. Defendant asserted—in his appellate memorandum at p. 2, ll. 3–6—this is not what he wanted to do. However, this Court notes Defendant did not sign his appellate memorandum and failed to provide this Court with any supporting evidence or affidavit indicating what occurred at the Buckeye Court in January.

proceeding at the time of the scheduled hearing on January 30, 2012. The Arizona Rules of Protective Order Proceeding (ARPOP), Rule 4 (A) (3) states:

> No protective order is invalid or ineffective merely because a judicial officer of a limited jurisdiction court issued it when an action or maternity or paternity, annulment, legal separation, or dissolution of marriage was pending in superior court.

ARPOP, Rule 4(A)(4) provides the procedure to be used after a limited jurisdiction court verifies that a family law action is pending. This procedure requires the limited jurisdiction court to transfer the documents to the superior court within 24 hours of being notified about the Superior Court action. The failure to do so, however, does not invalidate an action taken by the limited jurisdiction court. ARPOP, Rule 4(A)(4)(b) specifically states:

> Notwithstanding this transfer requirement, unless prohibited by a superior court order, a limited jurisdiction court may hold a hearing on all matters relating to an *ex parte* protective order if the hearing was requested before receiving written notice of the pending superior court action.

Here, the request for hearing was made on January 23, 2012. The trial court was not told of the pending dissolution action until January 30, 2012. Therefore the trial court was able to hold a hearing on the matter and did not err by so doing.[12]

However, because the trial court erred by conducting a hearing that failed to afford the parties due process, the hearing determination must be vacated. Because the trial court has been given notice about a pending Superior Court action, the matter—to the extent it is still pending—must be transferred to Superior Court for further proceedings. Finally, because the hearing has been vacated, all orders emanating from the hearing are vacated as well. This then reinstates the original Order of Protection as issued by the trial court—to the extent it is still valid—but vacates all proceedings thereafter.

III. CONCLUSION.

Based on the foregoing, this Court concludes the Buckeye Magistrate Court erred in conducting a contested hearing that failed to afford the parties their full panoply of rights. The hearing—and any orders emanating from the contested hearing—are vacated.

IT IS THEREFORE ORDERED vacating the determination stemming from the contested hearing held by the Buckeye Magistrate Court.

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. . . . .

. . . . .

[12] The matter was subsequently transferred to the Superior Court.

IT IS FURTHER ORDERED remanding this matter to the Buckeye Magistrate Court for all further appropriate proceedings.[13]

IT IS FURTHER ORDERED signing this minute entry as a formal Order of the Court.

/s/ Myra Harris
THE HON. MYRA HARRIS
Judicial Officer of the Superior Court 100420121300

[13] This matter is remanded to the limited jurisdiction court only to the extent there no longer is a pending dissolution action in Superior Court and the Order of Protection is still valid. Neither party has informed this Court of the status of the dissolution action or if the Superior Court has made subsequent orders about the Order of Protection in the intervening time.